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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16

17 ELISSA M. ROBERTS, Individually and on
Behalf of All Others Similarly Situated,

18 Plaintiff,

19 vs.

20 BLOOM ENERGY CORPORATION, et al.,

21 Defendants.
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27
28

Lead Case No. 3:19-cv-02935-HSG

CLASS ACTION

**SECTION 10(B) DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Honorable Haywood S. Gilliam, Jr.
Hearing Date: October 15, 2020
Hearing Time: 2:00 p.m.
Oakland Courthouse, Courtroom 2, 4th Floor

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on October 15, 2020, at 2:00 p.m., the Section 10(b) Defendants will and hereby do bring this motion for hearing before the Honorable Haywood S. Gilliam, Jr., Courtroom 2, Fourth Floor, Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, California, 94612. The Section 10(b) Defendants are Bloom Energy Corporation (Bloom or the Company), its CEO KR Sridhar and its former CFO Randy Furr.

As set forth in the attached memorandum, the Court should dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) the claims asserted under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). Lead Plaintiff James Everett Hunt, together with other plaintiffs listed in the Second Amended Complaint (Plaintiffs), has failed to state a claim on which relief may be granted. Plaintiffs fail to plead their Section 10(b) claims with the particularity required by the Private Securities Litigation Reform Act and Federal Rule of Civil Procedure 9(b). Specifically, Plaintiffs have (1) failed to plead with particularity that any Section 10(b) Defendant made a materially false or misleading statement, (2) failed to establish a strong inference of intentional fraud, and (3) with respect to certain challenged statements, failed to plead loss causation with particularity.

Plaintiffs also allege a “controlling person” claim against Sridhar and Furr under 15 U.S.C. § 78t(a) of the Exchange Act. This claim fails because Plaintiffs have not established a primary violation under Section 10(b).

Each of the three Section 10(b) Defendants, together with 18 other parties, is also named as a defendant in Plaintiffs’ separately-pled claim under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k. These 21 defendants are separately filing two motions to dismiss Plaintiffs’ Section 11 claim: (1) a motion filed by PricewaterhouseCoopers LLP (PwC), Bloom’s independent auditor, and (2) a motion filed by the 20 remaining defendants, who are referred to as the “Section 11 Defendants.”¹

¹ Concurrently with their motions to dismiss, all Defendants are also collectively moving to strike from the Complaint references to all plaintiffs other than the court-appointed Lead Plaintiff.

1 Plaintiffs' Section 10(b) and Section 11 claims are based on largely overlapping challenged
2 statements. With respect to both claims, Plaintiffs bear the burden of pleading that the challenged
3 statements were materially false or misleading when made. In an effort to promote efficiency and
4 avoid repetition, the Section 10(b) Defendants incorporate into this motion the discussion of falsity
5 presented in the Section 11 Defendants' motion and memorandum.

6 This motion is based on the attached memorandum, the memorandum submitted by the
7 Section 11 Defendants, the Omnibus Request for Judicial Notice, the Omnibus Declaration of Robin
8 Wechkin and all attached exhibits, and such argument as may be presented before or at the hearing
9 in this matter.

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1 **I. PRELIMINARY STATEMENT/INTRODUCTION**

2 The current complaint in this action consists of two parts. In the first, Plaintiffs assert claims
 3 under Section 11 of the 1933 Act against a large slate of defendants – Bloom, nine of Bloom’s
 4 current or former officers and directors, the ten underwriters of Bloom’s IPO and Bloom’s
 5 independent auditor. In the second part of the complaint, Plaintiffs assert a claim under Section
 6 10(b) of the 1934 Act against only three defendants – Bloom, its CEO KR Sridhar and its former
 7 CFO Randy Furr. The present motion addresses the second part of the complaint, which contains the
 8 Section 10(b) claims. The first part of the complaint is addressed in two separate motions and
 9 memoranda – one filed by all of the Section 11 defendants except the auditor (the Section 11
 10 Defendants’ Brief) and one filed by the auditor, PwC.

11 Plaintiffs challenge a common core of statements in their Section 11 and Section 10(b)
 12 claims – statements that appear in Bloom’s IPO Registration Statement. Under Section 10(b),
 13 Plaintiffs also target similar or identical statements Bloom made in the 16 months after its IPO.
 14 Because Plaintiffs’ Section 11 and Section 10(b) claims arise from largely overlapping statements,
 15 they also share many of the same defects. In this brief, we therefore do not repeat but instead
 16 incorporate by reference the arguments in the Section 11 Defendants’ Brief, which relate primarily
 17 to Plaintiffs’ failure to identify materially false or misleading statements in the Registration
 18 Statement. These arguments provide ample grounds to dismiss Plaintiffs’ Section 10(b) claim as to
 19 all challenged statements in the Registration Statement, as well as to the many similar challenged
 20 statements made outside the Registration Statement.

21 The purpose of this brief is twofold: (1) to address the limited set of statements Plaintiffs
 22 challenge under Section 10(b) that differ in any relevant way from those challenged under Section
 23 11, and (2) to explain why Plaintiffs’ failure to plead elements unique to their Section 10(b) claim –
 24 scienter and loss causation, both of which are governed by heightened pleading standards – provides
 25 an additional reason to dismiss the Section 10(b) claim. We suggest that the Court review the
 26 Section 11 Defendants’ Brief before reading the current brief.

27 **Scienter.** Under the Private Securities Litigation Reform Act (PSLRA), Plaintiffs must plead
 28 particularized facts supporting a strong inference that the two individual Section 10(b) defendants –

1 Sridhar and Furr – made intentionally false or misleading public statements. Plaintiffs have not
 2 come close to meeting this heightened standard. Plaintiffs make virtually no effort to plead facts
 3 showing that the two executives knew that those statements were (purportedly) false or misleading.
 4 With respect to the four claims related to Bloom’s financial statements or internal controls – each of
 5 which must be analyzed as a statement of opinion – Plaintiffs allege no facts showing that Sridhar or
 6 Furr knew the challenged accounting was wrong. Meanwhile, the fact that PwC repeatedly agreed
 7 that Bloom’s accounting was appropriate weighs heavily against any such inference.

8 Plaintiffs similarly plead no facts showing that Sridhar or Furr believed that two challenged
 9 projections – one related to third-quarter 2018 product acceptances and one to fuel cell lifespan –
 10 were (allegedly) wrong. Plaintiffs’ sole confidential witness, CW 1, who speaks only to the product
 11 acceptance forecast, does not claim even to have met Sridhar or Furr, and plainly has no basis on
 12 which to make assertions about what the two executives knew. Plaintiffs’ allegations of financial
 13 motivation are similarly deficient. Plaintiffs identify no discretionary stock sales, and their
 14 references to incentive compensation and corporate objectives could be made with respect to
 15 virtually any public company. Taken separately or considered holistically, Plaintiffs’ scienter
 16 allegations fall short of the PSLRA’s rigorous pleading standard.

17 ***Loss causation.*** Plaintiffs claim that the allegedly concealed truth about fuel cell lifespan
 18 was revealed when a short seller disseminated a critique of Bloom’s business in September 2019.
 19 The authors of the critique did not purport to present new facts about Bloom; to the contrary, they
 20 explicitly stated that their report was based on their analysis of publicly available information.
 21 Plaintiffs’ challenge to statements about fuel cell life therefore fails on causation grounds: A short
 22 seller’s analysis of already-public information does not constitute a corrective disclosure and cannot
 23 establish loss causation. Plaintiffs also fail to plead loss causation with respect to their claim that
 24 Bloom wrongly delayed adopting a new accounting standard, ASC 606.

25 For all of the length and seeming detail of their complaint, Plaintiffs have failed to plead
 26 what the PSLRA requires: particularized facts supporting a cogent and compelling inference of
 27 intentional fraud. The Court should dismiss Plaintiff’ Section 10(b) claim in its entirety.
 28

II. BACKGROUND

Plaintiffs' Section 10(b) claims arise from three events. The first event, which triggered this litigation, was Bloom's November 5, 2018 announcement of third-quarter 2018 results. Bloom had projected 215 to 235 acceptances in that quarter. Bloom finished the quarter with 206 acceptances, and Plaintiffs allege that the announcement of this small miss drove the Company's stock price down. ¶ 483.² Plaintiffs' Section 10(b) claim is based on the same (or very similar) risk disclosure statements Plaintiffs challenge under Section 11. ¶¶ 53, 138, 199.

The second event occurred on September 17, 2019 – four months after this action was filed – when a short seller called Hindenburg Research issued a critique of Bloom's business. ¶¶ 157, 181, 185. Short sellers benefit when a company's stock price declines, and they often issue statements or reports about a company's business with the object of driving the stock price down. The authors of the Hindenburg report explicitly acknowledged this: "You should assume that as of the publication date of any short-biased report or letter, Hindenburg Research . . . along with our clients and/or investors has a short position . . . and therefore stands to realize significant gains in the event that the price of any stock covered herein declines." Ex. 21 at 59.

Unlike plaintiffs asserting claims under Section 10(b), short sellers are not primarily concerned with showing that a company's previous public statements were intentionally false. Their objective is more simply to show that a stock is overvalued. The Hindenburg authors sought to demonstrate this by analyzing publicly available information about Bloom that, in their view, showed that the Company could not succeed in its business. The authors projected that Bloom's service business will be massively unprofitable in the future, as the Company fulfills obligations under future service contracts. ¶ 157. They further disputed Bloom's estimate that its newer-generation fuel cells have a five-year lifespan, ¶ 185, and charged that Bloom's Energy Servers are neither efficient nor clean. ¶ 181. Based on this critique, Plaintiffs challenge (1) all of Bloom's financial statements between 2016 and the third quarter of 2019; (2) statements in the Registration Statement about fuel cell lifespan; and (3) statements in the Registration Statements as well as subsequent written and oral statements about efficiency and emissions. *E.g.*, ¶¶ 201, 274 (financial

² All "¶" citations refer to paragraphs in the Second Amended Complaint, Dkt. No. 113. All "Ex. _" citations refer to exhibits to the concurrently-filed Omnibus Declaration of Robin Wechkin.

statements); ¶¶ 75, 184 (fuel cell lifespan); ¶¶ 194, 225, 235 (efficiency and emissions).

The third and final event underlying Plaintiffs' claims took place in February-March 2020, when Bloom advised investors that it had made an error in accounting for Managed Services transactions. Bloom announced on February 12, 2020 that it would (1) revise its financial statements for 2016, 2017 and the first quarter of 2018, and (2) restate its financial statements for the second quarter of 2018 through the third quarter of 2019. ¶ 400. Bloom then issued revised and restated financial statements in its 2019 Form 10-K, filed March 31, 2020. Ex. 12 at 164-212.

Based on this revision and restatement, Plaintiffs challenge Bloom's financial statements for every period between 2016 and the third quarter of 2019. *E.g.*, ¶¶ 205-06, 250-51, 279-82. For the final six quarters – the second quarter of 2018 through the third quarter of 2019 – Plaintiffs also challenge Bloom's Sarbanes-Oxley Section 302 certifications. *E.g.*, ¶¶ 210, 255, 286. In these certifications, Sridhar and Furr stated that, based on their knowledge, the reported financial statements in the Forms 10-Q and 10-K at issue were accurate and the filings contained no materially false or misleading statements. *Id.* Plaintiffs claim that because Bloom's financial statements contained errors, the Section 302 certifications were intentionally false or misleading.

Plaintiffs also challenge statements Bloom made under a different provision of Sarbanes-Oxley, Section 404. Pursuant to Section 404, Bloom stated that management had concluded, based on its evaluation, that the Company's internal controls were effective. *E.g.*, ¶¶ 253, 284. Plaintiffs claim that these statements were deliberately false or misleading in light of Bloom's acknowledgment in its 2019 Form 10-K that a control weakness existed as of December 31, 2019. ¶ 415.

III. DISCUSSION

A. Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Any Of The Seven Groups Of Challenged Statements.

Under the exacting standards of the PSLRA, Plaintiffs must plead both falsity and scienter with particularity. *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876-77 (9th Cir. 2012) (plaintiffs must "state with particularity both the facts constituting the alleged violation and the facts evidencing scienter") (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)). The scienter standard is demanding: Plaintiffs must "state with particularity facts giving rise to a strong

inference that the defendant acted” with scienter. 15 U.S.C. § 78u-4(b)(2). A court should deny a motion to dismiss “only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Tellabs*, 551 U.S. at 324. Plaintiffs must thus “plead with particularity facts that give rise to a ‘strong’ – i.e., a powerful or cogent – inference.” *Id.* at 323. Courts evaluate scienter allegations both individually and holistically. *In re NVidia, Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014).

Plaintiffs must satisfy this standard, moreover, with respect to the two individual Section 10(b) defendants – Sridhar and Furr. The Ninth Circuit has held that the theory of corporate or collective scienter is available, at most, in narrow circumstances in which the challenged statements are “so dramatically false . . . [as] to create an inference of scienter that at least some corporate officials knew of falsity upon publication.” *NVidia*, 768 F.3d at 1063 (rejecting corporate scienter allegations) (internal quotation marks omitted). Plaintiffs here appear to recognize that they cannot meet this standard: In connection with corporate scienter, they state only that Bloom is liable for the actions of Sridhar, Furr and all other employees under principles of *respondeat superior*. ¶¶ 478-79.

Respondeat superior does not relieve Plaintiffs of the obligation to show that the executives who made the challenged statements – Sridhar and Furr – did so knowing of their purported falsity. “[L]iability for fraud cannot be imputed to a corporation without evidence that an agent of the corporation who participated in making the challenged statements did so with scienter.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices & Prod. Liab. Litig.*, 2017 WL 6041723, at *8 (N.D. Cal. Dec. 6, 2017); *Prodanova v. H.C. Wainwright & Co.*, 2018 WL 8017791, at *14 (C.D. Cal. Dec. 11, 2018) (dismissing Section 10(b) claim where plaintiffs could not show that the author of the challenged statement knew that it was false; rejecting argument that plaintiffs could show corporate scienter by reference to a different employee’s purported knowledge). Plaintiffs have not pled facts here showing that Sridhar and Furr made intentionally false statements, and this shortfall is equally fatal to Plaintiffs’ effort to plead scienter as to Bloom.

1. **Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Their “Construction Delay” Claim.**

As discussed in the Section 11 Defendants’ Brief, Bloom cautioned investors that the

processes of construction, installation and acceptance were subject to delay resulting from various factors outside the Company's control, from weather to customer financing arrangements – factors that are virtually impossible to predict. Fairly read, the challenged statements did not conceal the fact that delay was an ongoing feature of Bloom's business; they revealed that fact.

Plaintiffs' construction delay claims also fail under Section 10(b) for reasons beyond those discussed in the Section 11 Defendants' Brief. Plaintiffs rely almost entirely on views attributed to CW1. Confidential witness allegations are subject to the PSLRA's rigorous pleading standards. Plaintiffs must accordingly provide a "basis for determining that the witnesses in question have *personal knowledge* of the events they report." *Zucco Partners v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009) (emphasis added). Plaintiffs must also describe confidential witnesses "with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Id.* (internal quotation marks and citation omitted).

Plaintiffs fall far short of these standards. Plaintiffs admit that CW1 left Bloom five months before the IPO – which is when the challenged statements were made – and seven months before the end of the third quarter of 2018, when Bloom narrowly missed guidance on acceptances. ¶¶ 142, 431. By definition, CW1 did not have personal knowledge of the facts about Bloom's third-quarter performance attributed to him. Plaintiffs seek to cure this fatal defect with the claim that CW1 stated that construction delays "continued after he left." *Id.* Even if this could substitute for personal knowledge – and it clearly cannot – Plaintiffs would need to specify *how* CW1 came to know about events at Bloom that occurred after he left Bloom. Again, Plaintiffs must plead facts establishing a *basis* for CW1's purported knowledge. *Zucco*, 552 F.3d at 995. Plaintiffs have not done so.

Equally critically, Plaintiffs plead no facts showing that Sridhar and Furr were aware of the information attributed to CW1. Plaintiffs claim that CW1 "indicated that upper management, all the way up to Sridhar, typically became aware right away." ¶ 144. But Plaintiffs provide no basis for CW1's purported knowledge about Sridhar and Furr: CW1 does not claim to have interacted with or even met the two executives. Courts routinely reject confidential witness allegations – and dismiss claims on scienter grounds – where a witness cannot connect purported information with individual Section 10(b) defendants. *E.g., Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 814 (N.D. Cal.

2019) (“None of the CWs had any direct (or indirect) contact with any of the Individual Defendants and therefore cannot provide reliable insight into the Defendants’ state of mind”); *Waterford Twp. Police & Fire Ret. Sys. v. Mattel, Inc.*, 321 F. Supp. 3d 1133, 1154 (C.D. Cal. 2018) (“since Plaintiff does not allege that FE2 had any meaningful contact with Defendants, the allegations related to FE2 do not support an inference that Defendants had any knowledge of the . . . reports to which FE2 had access”), *aff’d*, 794 F. App’x 669 (9th Cir. 2020). Plaintiffs’ conclusory confidential witness allegations fail to create a strong inference of scienter.

Plaintiffs’ construction delay claim also fails for a separate reason unique to the Section 10(b) context. Plaintiffs premise the claim on Item 303 of Regulation S-K, ¶ 140, but under controlling law, Item 303 does not provide a basis for liability in a Section 10(b) claim. *NVIDIA*, 768 F.3d at 1056. Thus even beyond the defects that beset their use of Item 303 in the context of their Section 11 claim, Item 303 cannot provide a basis for Plaintiffs’ Section 10(b) claim.

2. Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Bloom’s Accounting For MSAs.

Based on Bloom’s restatement and revision, Plaintiffs claim that Bloom’s accounting for its Managed Services Agreements (MSAs) rendered the Company’s financial statements for 2016 through the third quarter of 2019 materially false or misleading. The Section 11 Defendants have shown why this claim fails – on falsity and materiality grounds – as to all financial statements reported in the Registration Statement. The Section 11 Defendants’ falsity and materiality arguments apply equally to Plaintiffs’ attack on the Registration Statement under Section 10(b).

As to Plaintiffs’ challenge to the financial statements for periods reported after the IPO – the second quarter of 2018 through the third quarter of 2019 – the Section 11 Defendants’ falsity arguments again apply. Plaintiffs have failed to comply with the requirements for challenging opinion statements laid down in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015).

Critically, Plaintiffs’ Section 10(b) challenge to all of the financial statements at issue also fails on scienter grounds. Ninth Circuit law has long been clear that an error in applying GAAP – even an error that leads to a restatement – cannot in itself support a strong inference of scienter.

1 *Zucco*, 552 F.3d at 1000 (“the mere publication of a restatement is not enough to create a strong
 2 inference of scienter”); *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 390 (9th
 3 Cir. 2002). Plaintiffs nevertheless contend that scienter can be inferred from Bloom’s errors in
 4 accounting for the MSAs. ¶¶ 461-71. Remarkably, Plaintiffs scarcely mention the two individual
 5 defendants with respect to whom they must support that inference. Plaintiffs do not refer to Sridhar
 6 at all in their effort to show scienter with respect to Bloom’s MSAs. Plaintiffs do refer to Furr, but
 7 only to observe that he has earned credentials and spent his career in business and finance. ¶ 471.
 8 Allegations of this sort are insufficient. *E.g.*, *In re Hypercom Corp. Sec. Litig.*, 2006 WL 1836181,
 9 at *8 (D. Ariz. July 5, 2006) (“The fact that [the company’s CFO] had professional experience at the
 10 time of the misclassification does not suggest that the mistake must have been intentional”).

11 Rather than seeking to plead the necessary facts about Sridhar’s and Furr’s state of mind,
 12 Plaintiffs provide their own views about lease accounting, including their view that “capital leases
 13 are generally less desirable than operating leases.” ¶ 465. Plaintiffs then claim that the matter was
 14 subject to “very clear bright line provisions” and that “[h]ad the Defendants bothered to actually
 15 apply” those provisions, they would not have made errors. ¶¶ 466, 470.

16 This does not suffice to create a strong inference of intentional wrongdoing. Plaintiffs’
 17 contention that the accounting errors were obvious is plainly belied by PwC’s judgment, over
 18 multiple audits and other reviews, that Bloom’s treatment of the MSAs as sales was appropriate. As
 19 significantly, Plaintiffs’ generalized contention that the errors were obvious is largely beside the
 20 point in the scienter analysis, which is necessarily focused on the state of mind of particular
 21 individuals:

22 A plaintiff . . . cannot merely point to a GAAP principle and contend that a correct
 23 interpretation was simple or obvious. At the very least, the plaintiff must present facts
 24 demonstrating that *the defendant* was aware of the relevant GAAP principle and that *this*
 25 *defendant* knew how that [principle] was being interpreted. The plaintiff must then plead
 facts explaining how *the defendant’s incorrect interpretation* was so unreasonable or
 obviously wrong that it should give rise to an inference of deliberate wrongdoing.

26 *Oklahoma Firefighters Pension & Ret. Sys. v. IXIA*, 50 F. Supp. 3d 1328, 1361 (C.D. Cal. 2014)
 27 (internal quotation marks and citation omitted; emphasis added). Plaintiffs’ burden in this case is to
 28 plead specific facts showing that Sridhar and Furr were familiar with the GAAP provisions

governing Bloom’s accounting for its MSAs, with the way in which the Company was applying those provisions and with the fact that this application was wrong. *See, e.g., Bao v. Solarcity Corp.*, 2016 WL 54133, at *6 (N.D. Cal. Jan. 5, 2016) (dismissing challenge to financial statements on scienter grounds where plaintiffs fail to allege facts related to “Defendants’ specific conduct regarding accounting practices”). Plaintiffs have not pled the required facts here.

This is fatal. Courts have repeatedly dismissed accounting-based claims on scienter grounds even where Section 10(b) plaintiffs are able to plead significantly more facts about an individual defendant’s knowledge of accounting errors than Plaintiffs have pled here. Thus in *Cadence*, where the company was required to restate revenue related to software licenses with two major customers, plaintiffs alleged that the individual defendants had spent time with those customers and played a role in approving the transactions that were later restated. *In re Cadence Design Sys., Inc., Sec. Litig.*, 654 F. Supp. 2d 1037 (N.D. Cal. 2009). This was insufficient to establish scienter: Plaintiffs had not shown that the individual defendants “were likely to know first hand the facts” necessary to make a correct accounting determination. *Id.* at 1046-49. Similarly, in *Taleo* – another restatement case – plaintiffs were able to show that the individual defendants were to varying degrees familiar with the company’s accounting procedures. *In re Taleo Corp. Sec. Litig.*, 2010 WL 597987 (N.D. Cal. Feb. 17, 2010). This was again insufficient: Plaintiffs failed to plead the required “facts demonstrating that defendants ‘were furnished with information that would have allowed them to discern that the financial data *was wrong*.’” *Id.* at *9 (citing and quoting *City of Brockton Ret. Sys. v. Shaw Group, Inc.*, 540 F. Supp. 2d 464 (S.D.N.Y. 2008)) (emphasis in original). The absence of facts required to establish scienter is even starker in this case. Plaintiffs do not even attempt to connect Sridhar or Furr with Bloom’s accounting for the MSAs. Plaintiffs certainly have pled no facts supporting a strong inference that the two executives knew that Bloom’s accounting for the transactions “was wrong.”

Without mentioning Sridhar or Furr, Plaintiffs seek to build a scienter case by pointing to a disclosure in the selected consolidated financial data presented in the Registration Statement. Bloom stated there that the Company had historically recognized revenue on the MSAs ratably over the life of the contracts. ¶ 434. Plaintiffs claim that this disclosure shows scienter. According to Plaintiffs,

1 Bloom “disclosed the proper way to account for the MS transactions” in the Registration Statement –
2 which shows that the Company knew what the appropriate accounting treatment was – but then did
3 not apply that treatment. ¶ 437.

4 This contention fails for multiple reasons. Most obviously, Plaintiffs plead no facts showing
5 that the description of revenue recognition in the Registration Statement bears in any way on Sridhar
6 or Furr’s state of mind, or indicates that either executive intentionally deviated from GAAP with
7 respect to Bloom’s MSA accounting.

8 Plaintiffs are also disregarding chronology. The effect of Bloom’s accounting error had a de
9 minimis effect on revenue in the periods reported in the Registration Statement. ¶ 90 (alleging a 2.8
10 percent impact on revenue for 2017 and a 0.5 percent impact on revenue for the first quarter of
11 2018). The obvious explanation for this is that during these periods, Bloom was applying sale
12 accounting to only a very small number of its MSA transactions; this is the reason the revisions to
13 revenue were so small when the error was corrected. For the balance of its MSAs at that time, as
14 Plaintiffs note, Bloom explained that it had recognized revenue ratably. ¶ 435.

15 Bloom also told investors in the Registration Statement that it was making changes to its
16 purchase arrangements such that moving forward, the Company would be able to recognize the vast
17 majority of its product and installation revenue at the time of acceptance, *i.e.*, upfront. Ex. 1 at 62.
18 Consistent with that disclosure, Bloom advised investors in subsequent filings that the upfront
19 portion of its product and installation revenue in general was growing. Ex. 4 at 75. In its 2018 Form
20 10-K, Bloom reported that it now recognized product and installation revenue from of its MSAs at
21 acceptance, *i.e.*, upfront. Ex. 6 at 42. Bloom’s public statements about revenue recognition, far
22 from showing intentional fraud, demonstrate that the Company was appropriately updating its
23 disclosures to reflect changes within the purchase options it offered to customers and the resulting
24 changes in the accounting treatment of those transactions.

25 Other aspects of Bloom’s restatement also defeat rather than supporting an inference of
26 scienter. Where the effect of a restatement is not to eliminate previously-reported revenue but only
27 to move revenue into later periods – which is the case here – this cuts against scienter. *See IXIA*, 50
28 F. Supp. 2d at 1364. In addition, there is no suggestion in the complaint that Bloom’s MSA

1 accounting error turned a loss for any period into a profit. For all reported periods, the result of the
 2 restatement was simply to turn a loss into a larger loss. ¶¶ 90, 191, 222, 279, 297, 345, 379.
 3 Similarly, Plaintiffs do not allege that Bloom’s error in accounting for the MSAs enabled the
 4 Company to meet its own or analysts’ projections for any quarter. Even in cases where Section
 5 10(b) plaintiffs are able to show such an effect, courts will not infer scienter in the absence of
 6 particularized facts showing that the individual defendants knew the accounting was wrong.
 7 *Cadence*, 654 F. Supp. 2d at 1042, 1046-48 (dismissing on scienter grounds notwithstanding
 8 plaintiffs’ allegation that company would have missed projections but for an accounting error that
 9 was later the subject of a restatement). Plaintiffs here do not allege that accounting errors enabled
 10 Bloom to meet guidance or show a profit.

11 Indeed, Plaintiffs’ scienter allegations are notable in multiple ways for what they lack. For
 12 all of Plaintiffs’ insistence that Bloom’s accounting for the MSAs was obviously wrong, Plaintiffs
 13 cite no confidential witness suggesting that any person within Bloom *disagreed* with the Company’s
 14 treatment of the MSAs as sales. Even in cases where plaintiffs *are* able to cite statements of
 15 witnesses concluding that the challenged accounting was plainly wrong, courts dismiss on scienter
 16 grounds where the facts alleged do not show that *the individual defendants* believed that to be the
 17 case. *Hypercom*, 2006 WL 1836181, at *7-11; *see also, e.g., Cadence*, 654 F. Supp. 2d at 1047
 18 (dismissing on scienter grounds where, among other things, “[n]o CW resembles a ‘whistle blower,’
 19 or alleges that anyone within [the company] instructed them to do anything wrong”). Here, of
 20 course, nobody but Plaintiffs themselves – with the benefit of the restatement – has suggested that
 21 Bloom’s error was obvious or intentional. As discussed in the Section 11 Defendants’ Brief, the
 22 error turned on the evaluation of events-of-default provisions in a highly complicated series of
 23 contractual arrangements. And of course PwC, which was fully informed about the transactions, had
 24 consistently agreed that Bloom’s accounting was appropriate. Because Plaintiffs bear the burden of
 25 creating a strong inference of scienter, and because they have not cogently dispelled the far stronger
 26 inference that Bloom’s accounting error was the product of an innocent mistake, Plaintiffs’
 27 restatement-based claim fails on scienter grounds. *E.g., Taleo*, 2010 WL 597987, at *10-11
 28 (dismissing where “there are no facts from which the Court could conclude or infer that the

accounting was so simple and basic that defendants could not have made an innocent mistake”)
(internal quotation marks and brackets omitted).³

3. **Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Statements Related To Internal Controls.**

With respect to internal controls, Plaintiffs attack under Section 10(b) the same statement in Bloom’s Registration Statement they challenge under Section 11. ¶ 174. As discussed in the Section 11 Defendants’ Brief, Plaintiffs have mischaracterized the challenged statement and have failed to comply with *Omnicare*’s framework for pleading claims attacking opinion statements.

Plaintiffs also challenge under Section 10(b) the statements, required by Sarbanes-Oxley, that management, including the CEO and CFO, had evaluated internal controls and concluded that those controls were “effective to provide reasonable assurance” that a company has disclosed required information in its Exchange Act filings. *E.g.*, ¶¶ 253, 284. According to Plaintiffs, Bloom’s later recognition of an internal control weakness existing as of December 31, 2019 renders these statements knowingly false. *E.g.*, ¶¶ 254, 285. Plaintiffs use the Sarbanes-Oxley statements in two ways. They claim both that the statements were materially false or misleading representations in themselves, *id.*, and that the statements are probative of scienter with respect to *other* challenged statements – namely, Bloom’s financial statements. ¶¶ 472-75.

Plaintiffs are wrong on both counts. “Boilerplate language in a corporation’s 10-K form, or required certifications under Sarbanes-Oxley section 302(a) . . . add nothing substantial to the scienter calculus. . . . [A]llowing Sarbanes-Oxley certifications to create an inference of scienter in every case where there was an accounting error or auditing mistake by a publicly traded company would [eviscerate] the pleading requirements for scienter set forth in the PSLRA.” *Zucco*, 552 F.3d at 1003-04 (internal quotation marks and citations omitted). Courts within the Ninth Circuit have thus repeatedly recognized that an acknowledged internal control weakness – like an acknowledged financial statement error – is insufficient to support a strong inference of scienter. “[A]llegations

³ Plaintiffs’ inability to establish scienter is also fatal to their effort to show falsity under *Omnicare*’s first prong. That prong requires a demonstration that a defendant did not subjectively believe his or her opinion. 575 U.S. at 187-88; Section 11 Defendants’ Brief at 10. In the absence of facts about Sridhar’s or Furr’s state of mind, Plaintiffs have not shown that these defendants disbelieved the challenged opinion statements.

that Defendants had deficient internal controls during the class period does not create a strong inference that Defendants knowingly [made] false or misleading statements.” *In re Hansen Nat. Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1158 (C.D. Cal. 2007) (quoting *In re Loudeye Corp. Sec. Litig.*, 2007 WL 2404626 (W.D. Wash. Aug. 17, 2007)); *see also, e.g., Hypercom*, 2006 WL 1836181, at *9 (plaintiffs fail to establish scienter based on company’s subsequent recognition of internal control weaknesses; “[p]resumably every company that issues a financial restatement because of GAAP errors will cite as the reason a lack of effective internal controls”). Courts reject such allegations both when Section 10(b) plaintiffs challenge the Sarbanes-Oxley statements themselves and when they rely on those statements to demonstrate scienter with respect to other challenged statements. *See, e.g., M & M Hart Living Trust v. Global Eagle Entm’t, Inc.*, 2017 WL 5635425, at *5 (C.D. Cal. Oct. 30, 2017) (dismissing on scienter grounds claim challenging Sarbanes-Oxley certification); *Zucco*, 552 F.3d at 1003-04 (rejecting allegation that Sarbanes-Oxley certification establishes scienter as to other challenged statements).

Plaintiffs here plead no facts suggesting that Sridhar or Furr knew at any point during the purported class period of any defect in internal controls. Plaintiffs rely entirely on the fact, known only with hindsight, that Bloom *eventually* recognized a control weakness in connection with the restatement. This does not establish scienter. “‘An allegation that defendants should have known about internal control deficiencies based on nothing more than later acknowledgement of such weaknesses amounts to pleading fraud by hindsight.’” *Bruce v. Suntech Power Holdings Co.*, 2013 WL 6843610, at *3 (N.D. Cal. Dec. 26, 2013) (quoting *Roth v. OfficeMax, Inc.*, 527 F. Supp. 2d 791 (N.D. Ill. 2007)). Thus, where Section 10(b) plaintiffs “do not plead specific facts indicating that any of the individual defendants *recklessly disregarded* or *intentionally exploited* internal control deficiencies,” they cannot state a fraud claim on the basis of a company’s later acknowledgement of those deficiencies. *IXIA*, 50 F. Supp. 3d at 1364 (emphasis added). Plaintiffs have certainly pled no such facts in this case. Indeed, Plaintiffs quote – and do not challenge – Bloom’s statement in its February 12, 2020 Form 8-K that the Company’s error in accounting for the MSAs “did *not* result from . . . any override of controls or from any misconduct.” ¶ 400 (emphasis added). Plaintiffs have failed to state a fraud claim on the basis of Bloom’s Sarbanes-Oxley-mandated statements related to

1 internal controls.⁴

2 4. **Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Their Attack**
 3 **On Bloom’s Accounting For Contingent Liabilities.**

4 In addition to challenging Bloom’s financial statements based on the restatement and
 5 Bloom’s accounting for the MSAs, Plaintiffs claim that the financial statements were materially false
 6 or misleading because the Company (allegedly) did not appropriately account for contingent
 7 liabilities related to its one-year service contracts. Under Section 11, Plaintiffs launch this attack on
 8 Bloom’s financial statements for 2016, 2017 and the first quarter of 2018. Under Section 10(b),
 9 Plaintiffs expand that claim to encompass financial statements reported in Bloom’s Forms 10-Q and
 10 10-K for the second quarter of 2018 through the third quarter of 2019. *E.g.*, ¶¶ 201-03, 244-48.

11 As discussed in the Section 11 Defendants’ Brief, Plaintiffs have not established falsity with
 12 respect to this claim. Plaintiffs fail to comply with *Omnicare*’s requirements for challenging opinion
 13 statements, and in any event have not shown that Bloom’s financial statements contained errors
 14 related to contingent liabilities. Consistent with GAAP, Bloom recognized revenue and recorded
 15 costs with respect to actual contracts – not potential future contracts. Section 11 Defendants’ Brief
 16 at 11-13. Plaintiffs’ inability to show that the challenged financial statements were materially false
 17
 18

19 ⁴ As noted, Plaintiffs challenge two separate sets of statements required by Sarbanes-Oxley. *Supra*
 20 at 4. The statements just discussed – statements that management has evaluated the effectiveness of
 21 disclosure controls – are required by Sarbanes-Oxley Section 404. 15 U.S.C. § 7262. Plaintiffs also
 22 challenge certifications made under Section 302 of Sarbanes-Oxley. *E.g.*, ¶¶ 210, 286. In the latter
 23 certifications, Sridhar and Furr stated that “[b]ased on [their] knowledge,” the accompanying Form
 24 10-Q or 10-K did not contain untrue or misleading facts and fairly presented the company’s financial
 25 condition. *Id.*; see 15 U.S.C. § 7241. Although the Section 302 certifications also refer to
 26 management’s duty to design and evaluate effective internal controls, Plaintiffs do not challenge this
 27 part of the certification; Plaintiffs claim only that the Section 302 certifications were false because
 28 Bloom (purportedly) accounted for MSAs and contingent liabilities improperly. *E.g.*, ¶¶ 211, 287. Plaintiffs have thus failed to plead scienter with respect to the Section 302 certifications for the same reasons they have failed to plead scienter with respect to the underlying financial statements. *Supra* at 7-12 (MSAs); *infra* at 14-16 (contingent liabilities). Plaintiffs’ attack on the Section 302 certifications further fails because Plaintiffs have not shown that Sridhar or Furr disbelieved the statements in the certifications – and that is required in light of the prefatory statement “based on my knowledge.” *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 402 (S.D.N.Y. 2016) (“Because this statement is qualified by the phrase ‘[b]ased on my knowledge,’ the falsity of the statement is entirely dependent on what [the defendant] knew, not on what was objectively true at the time of the statement”).

1 or misleading dooms their Section 10(b) claim just as it dooms their Section 11 claim.⁵

2 In addition, Plaintiffs again fail to allege facts supporting a cogent and compelling inference
3 of intentional fraud. As with their attack on Bloom’s MSA accounting, Plaintiffs allege no facts
4 supporting an inference that Sridhar or Furr intentionally falsified Bloom’s financial statements.
5 Plaintiffs certainly have not pled facts showing that Bloom’s accounting was so “obviously wrong”
6 that Sridhar and Furr could only have made the alleged errors intentionally. Nobody but Plaintiffs –
7 for transparent litigation purposes – has suggested that Bloom’s accounting for contingent liabilities
8 was inconsistent with GAAP, let alone obviously so.

9 Within this factual vacuum, Plaintiffs point, first, to Bloom’s replacement of certain older-
10 generation servers in 2015. ¶ 422. This does not support an inference that Sridhar or Furr made
11 intentionally false statements about contingent liabilities. On the contrary: Bloom *disclosed* the
12 2015 replacements in the Registration Statement and subsequent filings, warning investors that
13 “[e]arly generations of our Energy Server did not have the useful life and did not perform at an
14 output and efficiency level that we expected.” Ex. 1 at 24; ¶ 423. Bloom further disclosed that as a
15 result of issues with these early-generation servers, the Company in 2015 “implemented a fleet
16 decommissioning program” for certain servers, and that this resulted in a significant adjustment to
17 revenue for the fourth quarter of 2015. Ex. 1 at 25; ¶¶ 69-70. Recognizing and disclosing
18 difficulties with prior estimates does not show deliberate fraud; it shows good faith. *See, e.g., Rigel*,
19 697 F.3d at 885 (“voluntarily publicly disclosed” information undermines inference of scienter).
20 Plaintiffs’ suggestion to the contrary depends on a tortured series of inferences – that later
21 generations of Energy Servers would also underperform estimates; that Bloom would be required to
22 replace those servers under potential future service contracts; that Bloom’s financial statements were
23 accordingly false insofar as the Company did not immediately record costs connected with those
24 future contracts; and that Sridhar and Furr therefore intentionally defrauded investors. ¶¶ 420-24.
25 Not one of these inferences is warranted or supported by factual allegations.

26 Plaintiffs next point to a series of transactions Bloom entered into in June 2019, in which a

27
28 ⁵ As with their construction delay claim, Plaintiffs rely on Item 303 in connection with their Section 10(b) contingent liability claim. *E.g.*, ¶¶ 151, 203. This is contrary to controlling law. Item 303 does not provide a basis for liability under Section 10(b). *Supra* at 7.

new financing entity purchased a majority interest in a project that employed Bloom Energy Servers to provide energy to public rate-payers in Delaware. ¶ 425; Ex. 8 at Item 1.01. As part of this series of transactions, Bloom committed to decommission older-generation Energy Servers and to deploy newer-generation servers if it was able to raise the capital needed to do so. *Id.*; *see also* ¶¶ 71, 333, 353-71; Ex. 8 at Item 1.01; Ex. 9 at 32. Plaintiffs do not and cannot allege that this complex series of transactions had anything to do with Bloom’s service contracts, or that Bloom was required to enter into the transactions as a result of commitments it made in those contracts to maintain and repair equipment. Indeed, the very fact that Bloom advised investors of these transactions by means of a Form 8-K – an SEC filing triggered in this case by the Company’s entrance into a material definitive agreement – shows that the Delaware project was anything *but* a routine repair or replacement under the Company’s service contracts. *See* 17 CFR §§ 240.13a-11, 240.15d-11, Ex. 8. Stated differently, the SEC filings on which Plaintiffs rely in an effort to establish falsity and scienter, ¶¶ 333-38, in reality show that the June 2019 transactions were not related to contingent liabilities under Bloom’s service contracts. These were transactions involving new parties, new financing and new construction. Even if the June 2019 transactions *were* linked with contingent servicing liabilities, moreover, Plaintiffs’ allegations shed no light whatsoever on Sridhar’s or Furr’s state of mind with respect to Bloom’s accounting for contingent liabilities.

Plaintiffs finally point to what they label a “Change in Risk Warnings” related to contingent liabilities. ¶¶ 476-77. This is baffling. Section 10(b) plaintiffs generally argue that falsity or scienter may be inferred when a company *fails* to change or update its risk disclosures. *See, e.g., Rochester Laborers Pension Fund v. Monsanto Co.*, 883 F. Supp. 2d 835, 853 (E.D. Mo. 2012) (plaintiffs attack risk disclosures on the basis that they “‘remained virtually unchanged’ during the relevant time period”; court grants motion to dismiss). In any event – although Plaintiffs’ allegations on this point are by no means clear – the change to which Plaintiffs appear to refer is contained not in Bloom’s risk disclosures but instead in the notes to the Company’s audited financial statements. In its 2018 Form 10-K, Bloom added a sentence to the financial statement note in which it discussed warranty obligations in its service contracts: “Customers may renew the [service contracts] leading to future expense that is not recognized under GAAP until the renewal occurs.” Ex. 6 at 91.

1 Plaintiffs' bewildering claim appears to be that because Bloom made clear to investors in its Form
 2 10-K that expenses related to potential future contracts are *not* recorded under GAAP, the Court
 3 should infer that Sridhar and Furr knew that Bloom in fact *should have* recorded those expenses
 4 under GAAP. That is nonsensical. Plaintiffs have not created the required cogent and compelling
 5 inference of scienter with respect to Bloom's accounting for contingent liabilities.

6 **5. Plaintiffs Fail To Plead Falsity Or Scienter With Respect To ASC 606.**

7 Plaintiffs leave unclear whether they are challenging under Section 10(b) – as they do under
 8 Section 11 – Bloom's statement that it was not required to apply ASC 606 at the time of the IPO. If
 9 Plaintiffs are indeed asserting such a claim, it fails as a matter of law. As the Section 11 Defendants
 10 have shown in their brief, Bloom's statement is demonstrably true as a legal matter. Plaintiffs have
 11 moreover alleged no facts at all about Sridhar's or Furr's knowledge of ASC 606, let alone facts
 12 supporting a strong inference that Sridhar or Furr believed that Bloom was required to adopt this
 13 provision earlier than it did.

14 **6. Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Challenged**
 15 **Statements About Fuel Cell Life.**

16 With respect to fuel cell life, Plaintiffs challenge exactly the same statements under Section
 17 10(b) that they challenge under Section 11 – the statements in the Registration Statement in which
 18 Bloom estimated a five-year lifespan for its later-generation fuel cells. ¶¶ 75, 184. As the Section
 19 11 Defendants have demonstrated, Plaintiffs have alleged no facts showing that the fuel cells needed
 20 replacement in less than five years. Plaintiffs rely on the Hindenburg authors' "extrapolation"
 21 purportedly showing that a shorter lifetime is indicated, but the fact that a short seller has made a
 22 different projection than a company does not show that the company's projection is wrong. Even if
 23 Plaintiffs had shown that the challenged estimate turned out to be wrong, moreover, they have not
 24 pled what *Omnicare* requires – facts showing that Defendants did not subjectively believe their
 25 opinion or omitted critical facts about the bases of their opinion. Section 11 Defendants' Brief at 10.⁶

26 ⁶ Plaintiffs' citation to an anonymous technician and an anonymous industry expert quoted by the
 27 Hindenburg authors, ¶ 185, is doubly insufficient under the PSLRA's pleading standards. *E.g., Diaz*
 28 *v. Northern Dynasty Minerals Ltd.*, 2018 WL 5099749, at *7 (C.D. Cal. April 30, 2018) (rejecting
 allegations plaintiffs adopted from a short seller report where the sources cited by the short seller
 were not identified by name and did not purport to have worked for the defendant company).

1 Plaintiffs fail equally to plead scienter. They allege no facts whatsoever bearing on what Furr
2 and Sridhar believed about fuel cell life, and that is fatal. *Supra* at 5.

3 **7. Plaintiffs Fail To Plead Falsity Or Scienter With Respect To Challenged**
4 **Statements About Efficiency And Emissions.**

5 Finally, Plaintiffs challenge under Section 10(b) the same or very similar statements about
6 efficiency and emissions they challenge under Section 11. *E.g.*, ¶¶ 194, 225, 235. Plaintiffs have
7 not shown under Section 10(b) any more than they have shown under Section 11 that these
8 statements were materially false or misleading. The third-party sources Plaintiffs cite in seeking to
9 show falsity – the University of Delaware article, the City of Santa Clara lawsuit and others – are in
10 no way inconsistent with the challenged statements. Section 11 Defendants’ Brief at 24-25.

11 Plaintiffs also fail to plead facts supporting a cogent and compelling inference of deliberate
12 wrongdoing. Plaintiffs cite a reference, in the February 2020 letter from Delaware state senators, to
13 an “Amy Roe” who is supposed to have read some vaguely-described material related to carbon
14 emissions into the record at a January 2019 hearing on a permit application. ¶ 182. Plaintiffs claim
15 that this put the Section 10(b) Defendants “on notice” that Energy Servers “were not as clean as they
16 represented to investors.” ¶ 439. This is virtually unintelligible. Plaintiffs do not explain who Amy
17 Roe is or what exactly she read into the record. Nor do they specify which “representation to
18 investors” is supposed to have been contradicted by whatever Amy Roe said or did. They certainly
19 plead no facts showing that Sridhar or Furr intentionally misled investors with respect to any
20 challenged representation.

21 Plaintiffs also invoke the “core operations” principle, claiming that it is “absurd to suggest
22 that the Section 10(b) Defendants did not know that the servers produced pollutants.” ¶ 439. But
23 Bloom did not state that its servers “produced [no] pollutants.” Bloom compared emissions from
24 Energy Servers with emissions from other specified energy sources and said that Bloom’s emissions
25 were lower. *E.g.*, ¶ 179 (Energy Servers produce “lower harmful emissions than conventional fossil
26 fuel generation”). Plaintiffs allege no facts showing that these comparisons were false or misleading.

27 The core operations theory cannot help Plaintiffs over that difficulty. “Proof under [the core
28 operations] theory is not easy.” *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d

1 1051, 1062 (9th Cir. 2014). The theory has no application where – as here – plaintiffs have not
 2 shown that any statement defendants actually made was false or misleading in the first place.
 3 *McGovney v. Aerohive Networks, Inc.*, 2019 WL 8137143, at *22 (N.D. Cal. Aug. 7, 2019) (“the
 4 Court cannot find it would be ‘absurd’ to assume the Individual Defendants did not know their
 5 statements are false and misleading because their statements are not in fact false or misleading”). In
 6 any event, the core operations theory requires Plaintiffs to plead “either specific admissions by one
 7 or more corporate executives of detailed involvement in the minutia of a company’s operations . . .
 8 or witness accounts demonstrating that executives had actual involvement in creating false reports.”
 9 *Intuitive Surgical*, 759 F.3d at 1062. Plaintiffs have alleged nothing of the kind here.

10 **B. Plaintiffs Have Not Created A Cogent And Compelling Inference Of Intentional**
 11 **Wrongdoing Under A Holistic Analysis.**

12 In addition to their statement-specific scienter allegations, Plaintiffs invite the Court to infer
 13 scienter based on Defendants’ purported motivation to commit fraud as to all challenged statements.
 14 ¶¶ 441-60. We discuss these general scienter allegations first and then present the holistic scienter
 15 analysis required by *Tellabs*.

16 **1. Plaintiffs’ Generic Financial Motivation Allegations Do Not Support A**
 17 **Strong Inference of Scienter.**

18 Under controlling law, allegations of motive and opportunity are “not independently
 19 sufficient” to establish scienter. *E.g., Intuitive Surgical*, 759 F.3d at 1062. Beyond this, Plaintiffs’
 20 motive allegations are largely self-defeating.

21 ***Insider stock sales.*** Plaintiffs point to two stock sales each by Sridhar and Furr. ¶¶ 455-60.
 22 Each sale was (1) made under a Rule 10b5-1 trading plan, and (2) made to pay tax liability incurred
 23 when restricted stock grants vested. Exs. 25-26. Such sales involve no discretion on the part of an
 24 officer or employee, and hence do not support – although they may rebut – an inference of scienter.
 25 *Metzler Inv. GmbH v. Corinthian Coll., Inc.*, 540 F.3d 1049, 1067 n.11 (9th Cir. 2008) (stock sales
 26 made under trading plans weigh against an inference of scienter); *In re Radian Sec. Litig.*, 612 F.
 27 Supp. 2d 594, 611 (E.D. Pa. 2009) (stock sales made to cover tax liability weigh against an inference
 28 of scienter) (citing authorities); *Plumley v. Sempra Energy*, 2017 WL 2712297, at *10-12 (S.D. Cal.

June 20, 2017) (stock sales made to pay tax withholding liability do not support an inference of scienter). The sales Plaintiffs cite weigh against an inference of scienter, not in favor of it.

Incentive compensation. Plaintiffs next claim that the Court should infer scienter because Sridhar and Furr were entitled to incentive compensation on consummation of the IPO and achievement of other unspecified milestones. ¶¶ 442-46. This is contrary to law. “[I]t is common for executive compensation, including stock options and bonuses, to be based partly on the executive’s success in achieving key corporate goals . . . [and] we will not conclude that there is fraudulent intent merely because a defendant’s compensation was based in part on such successes.” *Rigel*, 697 F.3d at 884; *see also, e.g., In re Regulus Therapeutics Inc. Sec. Litig.*, 406 F. Supp. 3d 845, 861 (S.D. Cal. 2019) (same); *In re Tibco Software, Inc.*, 2006 WL 1469654, at *21 (N.D. Cal. May 25, 2006) (“Plaintiffs *concede* that allegations concerning incentive compensation are insufficient as a matter of law”) (emphasis in original). Plaintiffs also claim that Sridhar’s and Furr’s compensation was “unreasonable,” but reasonableness is a negligence rather than a scienter standard; in any event, decisions about executive compensation are made not by executives but by a company’s board of directors and hence would not bear on Sridhar’s or Furr’s scienter.

Corporate motivation. Plaintiffs finally allege that the Section 10(b) Defendants were motivated to consummate an IPO at a purportedly inflated price so that Bloom could retire debt or incentivize creditors to exchange convertible debt for equity. ¶¶ 449-54. Plaintiffs also suggest that the Defendants were motivated to keep Bloom’s stock price high because additional debt will come due in late 2020 or 2021. ¶¶ 447-48. This too is contrary to law. “[A]llegations of routine corporate objectives . . . are not, without more, sufficient to allege scienter; to hold otherwise would support a finding of scienter for any company that seeks to enhance its business prospects.” *Rigel*, 697 F.3d at 884 (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002)); *see also Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 891 (4th Cir. 2014) (declining to infer scienter from ubiquitous financial motivations, including the motivation to avoid default on a loan covenant).

2. Plaintiffs’ Scienter Allegations Are As Defective Considered Together As Considered Separately.

Plaintiffs’ scienter allegations are no stronger taken together than considered separately.

1 Plaintiffs cite no facts suggesting that any person within Bloom – or PwC, for that matter – disagreed
 2 with Bloom’s financial reporting at the time of the challenged statements, much less that Sridhar or
 3 Furr believed that Bloom’s financial statements were false or misleading. The same is true of
 4 Plaintiff’s challenge to statements about internal controls, fuel cell life and fuel cell efficiency and
 5 emissions: Plaintiffs allege no facts indicating that Sridhar, Furr or anyone else at Bloom believed
 6 that the challenged statements were false or misleading. Plaintiffs present a single confidential
 7 witness on the subject of construction delay – and that person admits that he or she did not work for
 8 Bloom at the relevant time and does not purport to have interacted in any way with Sridhar or Furr.

9 Meanwhile, the facts alleged amply support an inference of good faith. Bloom sought PwC’s
 10 input on MSA accounting in real time and was told that the auditor agreed that the Company’s
 11 accounting was appropriate. On the subjects of contingent liabilities, fuel cell life and construction
 12 delay, Bloom provided investors with robust risk disclosures, which weighs against an inference of
 13 scienter and in favor of the inference that Defendants intended to portray the company’s position
 14 truthfully. *E.g., Jasin v. Vivus, Inc.*, 2016 WL 1570164, at *22 (N.D. Cal. Apr. 19, 2016) (“the
 15 Court agrees with Defendants that the thoroughness of [the] risk disclosures . . . negate[s] any
 16 inference of scienter even further”), *aff’d*, 721 Fed. App. 665 (9th Cir. 2018); Section 11
 17 Defendants’ Brief at 3 (summarizing disclosures).

18 On the issue of motivation, Plaintiffs allege facts about incentive compensation and corporate
 19 objectives that could be made against virtually any public company. Plaintiffs identify no
 20 discretionary stock sales that might indicate that Sridhar or Furr believed that Bloom’s stock price
 21 was inflated. On the other side of the ledger, the motivation of the Hindenburg authors, on whom
 22 Plaintiffs rely heavily, are very clear: to drive down Bloom’s stock price and thereby reap
 23 substantial financial benefits. The Hindenburg authors were free to do so, moreover, without the
 24 fiduciary and legal constraints that bind Bloom and its executives when they make statements that
 25 may influence stock price. On the question of motivation, Plaintiffs and their principal source
 26 clearly have the most to gain – and virtually nothing to lose – in denigrating Bloom’s business.

27 Plaintiffs’ burden is to allege facts supporting an inference of intentional wrongdoing that is
 28 strong, that is cogent and that is at least as compelling as the competing inference that Sridhar and

1 Furr made the challenged statements with a good-faith belief that they were accurate and not
2 misleading. Plaintiffs have not carried that burden.

3 **C. Plaintiffs Have Not Established Loss Causation With Respect To Bloom’s**
4 **Statements About Fuel Cell Life And ASC 606.**

5 In addition to their shortfalls in pleading falsity and scienter, Plaintiffs fail to meet their
6 burden to plead loss causation as to two of the seven categories of challenged statements – those
7 about fuel cell life and those about ASC 606. To adequately plead loss causation, a plaintiff must
8 allege that a company’s stock price “fell significantly after the truth became known.” *Dura Pharms.,*
9 *Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The relevant “truth” must relate to the allegedly false
10 statement or deceptive conduct: Securities plaintiffs must “show a causal connection between the
11 fraud and the loss . . . by tracing the loss back to the very facts about which the defendant lied.”
12 *Mineworkers’ Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th Cir. 2018) (internal
13 quotation marks and citations omitted). In the Ninth Circuit, Section 10(b) plaintiffs must plead loss
14 causation with particularity. *Oregon Pub. Emp. Ret. Fund v. Apollo Grp.*, 774 F.3d 598, 604-05.
15 Plaintiffs have not met their pleading burden here.

16 **Fuel cell life.** Plaintiffs claim that the purported falsity of Bloom’s statements about fuel cell
17 life was revealed to investors on September 17, 2019, when the Hindenburg authors issued their
18 report extrapolating a fuel cell life of less than three years. ¶ 486. But the Hindenburg critique on its
19 own terms cannot serve as a corrective disclosure. The Hindenburg authors stated explicitly that “all
20 information [in the report] has been obtained from public sources.” Ex. 21 at 59. With respect to
21 fuel cell life in particular, Hindenburg used public utility data as the source of its extrapolated
22 lifespan projections. ¶ 185. Reports of this sort – those offering opinions or analyses of publicly
23 available information rather than new factual information – cannot, as a matter of law, support loss
24 causation. Loss causation requires the disclosure of *new* information, and the “negative
25 characterization of already public information” offered by a short-seller, analyst or reporter is not
26 new information. *In re Omnicom Grp., Inc., Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010)
27 (collecting authorities). Likewise, “the mere repackaging of already-public information by an
28 analyst or short-seller is simply insufficient to constitute a corrective disclosure.” *Meyer v. Greene*,

710 F.3d 1189, 1199 (11th Cir. 2013) (citing *Omnicom* and other appellate decisions).⁷

These decisions are precisely on point. The Hindenburg authors, again, affirmatively stated that their report is based on public information. Because the Hindenburg critique cannot constitute a corrective disclosure, and because Plaintiffs identify no other “revelation” that Bloom’s estimate of fuel cell lifespan was wrong, Plaintiffs’ attack on that estimate fails on loss causation grounds.⁸

ASC 606. To the extent Plaintiffs are challenging Bloom’s statement about ASC 606 under Section 10(b), that challenge fails for a simple reason. There has never been a corrective disclosure about the timeliness of Bloom’s adoption of this accounting provision. Bloom correctly stated that it was not required to adopt ASC 606 at the time of the IPO. Plaintiffs point to no “revelation” that this was untrue, nor to any corresponding stock drop.

IV. CONCLUSION

The Court should dismiss Plaintiffs’ Section 10(b) claim in its entirety for the reasons stated above and in the Section 11 Defendants’ Brief. The Court should also dismiss Plaintiffs’ controlling person liability claim under Section 20(a) of the 1934 Act. That claim depends on an underlying primary violation, which Plaintiffs have failed to plead here. *City of Dearborn Heights Act 435 Police & Fire Ret. Sys v. Align Tech., Inc.*, 856 F.3d 605, 623 (9th Cir. 2017)

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⁷ Courts in the Ninth Circuit have followed these decisions in multiple cases. *E.g.*, *Bonanno v. Cellular Biomedicine Group, Inc.*, 2016 WL 4585753, at *4-6 (N.D. Cal. Sept. 2, 2016) (dismissing on loss causation grounds where plaintiffs relied on blogger’s analysis of publicly available information; “[b]ecause the [blog] only collected and opined on already public information, it does not constitute disclosure of ‘the truth’ as required for a corrective disclosure”); *In re Herbalife Sec. Litig.*, 2015 WL 12732428, at *6 (C.D. Cal. Mar. 27, 2015) (dismissing where loss causation allegations rested on short seller’s assessment of public information); *see also Miller v. PCM, Inc.*, 2018 WL 5099722, at *11 (C.D. Cal. Jan. 3, 2018) (dismissing on loss causation grounds where purported corrective disclosure was a blog post based on publicly available information).

⁸ The Hindenburg authors’ references to information obtained from a fuel cell technician and industry expert do not change the analysis. Neither Hindenburg nor Plaintiffs claim that this information was unavailable to the investing public or known only to Bloom insiders. ¶185.